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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|---|-------------|----------------------|---------------------|------------------|
| 10/636,069 | 08/06/2003 | James Carl Schmidt | 66192-0009 | 9856 |
| 10291 | 7590 | 05/02/2006 | EXAMINER | |
| RADER, FISHMAN & GRAUER PLLC 39533 WOODWARD AVENUE SUITE 140 BLOOMFIELD HILLS, MI 48304-0610 | | | WEIER, ANTHONY J | |
| | | | ART UNIT | PAPER NUMBER |
| | | | 1761 | |

DATE MAILED: 05/02/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/636,069

Applicant(s)

SCHMIDT, JAMES CARL

Examiner

Anthony Weier

Art Unit

1761

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 24 April 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1-14.
Claim(s) withdrawn from consideration: 40.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s): _____.
13. ☐ Other: _____.

Anthony Weier
Primary Examiner
Art Unit: 1761

4/27/06

Continuation of 11. does NOT place the application in condition for allowance because: The references as applied teach the invention as claimed. Applicant argues and recites in the Schmidt Declaration that Marsland prepares a solid dough rather than a pumpable batter per Applicant's invention. However, the instant claims recite nothing about the pumpability of the material used to make the wafer cookies. Moreover, the claims are directed to the end-product wherein the claimed airy and light attributes would be achieved employing the processing of Marsland as applied in the rejection of the Final Office Action. Applicants discuss the difference in density between the wafer of Marsland and that of wafers produced in relation to the instant claims. However, it should be noted that the instant claims do not set forth anything regarding the density of the final product. It is asserted that Marsland meets the instant claim limitation of "light and airy" even if the density or light and airy attributes differ in degree to that produced in the Schmidt Declaration. Nevertheless, even if the instant claims recited a particular density or degree of light and airiness, it should be further noted with regard to the Schmidt Declaration that it is difficult to discern what ingredients were added together in the comparison wafer preparations as it appears that only the protein content was addressed. It is not even clear if the same protein was employed in each test. As such, it is difficult to interpret whether the difference in density may be attributed to just the protein content or other unspecified ingredients (e.g. leavening agents). Applicants further recite that "adding additional leavening agent to the recipes of Marsland would not cure Marsland's density problem -- it certainly would not change to the consistency of the Marsland wafer to make it half as dense while maintaining its protein content." However, there is no evidence to support such conclusion. As set forth above, the instant claims do not recite the particular density or degree of light and airy attribute called for in the instant claims. Nevertheless, it is not considered unexpected to achieve these particular product densities as set forth in the Schmidt Declaration if one were to add the leavening agents as set forth by Arciszewski et al and RecipeSource (as applied in the Final Office Action) to impart leavening to the product. One skilled in the art wanting to provide a baked product which is lighter or fluffier would turn to the use of leavening agents as one alternative in achieving same. Although the preparation of the wafer in Marsland is still considered to fall within the general meaning of "light and airy" (Applicant admits that wafers by definition are "typically light and airy foods" in paragraph 28 of the instant Specification), there is no evidence that providing, alternatively, a leavening agent in the Marsland product would not or could provide the leavening required to achieve the light and airy attribute of the instant claimed invention..